IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 29 October 2026

SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2024-146251

In the matter between:

THE SOUTH AFRICAN PREDATOR ASSOCIATION	First Applicant
THOMAS WILLIAM VAN VUUREN	Second Applicant
PATRICK HENDRIK LOOTS	Third Applicant
MARTHINUS JOHANNES ERWEE	Fourth Applicant
FREDERICK CHRISTIAN DE WITT SCHEEPERS	Fifth Applicant
MARTHUINIS PETRUS CHRISTIAAN BAMBERGER	Sixth Applicant
JOHANNES CHRISTIAAN DE KLERK	Seventh Applicant
GEORGE CLAYTON FLETCHER	Eighth Applicant

DAVID DE VILLIERS CROUS	Ninth Applicant
HENRY CHRISTOPHER GOMES	Tenth Applicant
ANDRE HENDRIK DU PLESSIS	Eleventh Applicant
and	
THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	First Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
THE SCIENTIFIC AUTHORITY	Third Respondent
THE NATIONAL COUNCIL OF THE SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS ("*NSPCA*")	Fourth Respondent
THE TRUSTEES FOR THE TIME BEING OF THE EMS FOUNDATION & 5 OTHERS ("*EMS FOUNDATION*")	Fifth Respondent

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JUDGMENT

The judgment and order are published and distributed electronically.

Summary; Application to review the failure of the Minister to set annual export quotas for derivatives of lion bred in captivity in terms of CITES regulations. Issue arose if there is a legal duty on Minister to set annual export quota. Respondents argued that it is a discretionary power not reviewable under section 6(2)(g) of PAJA.

Held. Regulatory framework not couched in permissive language capable of interpreting a pure discretion. Plain language confers a duty and function. Further held that Minister, as executive responsible for implementation of NEMA and NEMBA, is obliged to manage competing interests between commercial and conservation interests as recognised in section 24 of the Constitution and can therefore not adopt a supine position when such conflicts arise, as failure to fulfil duties offends the rule of law.

PA VAN NIEKERK, J

INTRODUCTION:

[1] In terms of an amended notice of motion dated 29 August 2025, Applicants seek the following relief:

"1. *THAT the failure of the first respondent (the '**Minister**') to decide and to establish, an annual export quota for the 2024 and/or 2025 calendar year/s for trade in lion bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes, derived from captive breeding operations in the Republic of South Africa (the "**Republic**") be declared unlawful and invalid, and be reviewed and set aside.*

2. *THAT the Minister be ordered and directed to take all such steps necessary to decide and to establish an annual export quota for the 2024 and/or 2025 calendar year/s (and yearly thereafter) for trade in lion bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes, derived from captive breeding operations in South Africa, and thereafter to decide and to establish such annual export quota for the 2024 and/or 2025 calendar years (and yearly thereafter) and to report to the applicants on all steps taken.*

3. *THAT in determining any annual export quota the Minister is ordered to specifically consider: -*

3.1 *That there is currently a large stockpile of lion bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes,*

derived from captive breeding operations in South Africa because quotas have not been established for a number of years;

3.2 *That the value of the lion bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes, derived from captive breeding operations in South Africa decreases over time.*

4. *THAT in the event that the Minister fails to comply with an order herein or fails to comply therewith timeously, the applicants are granted leave on these same papers, duly supplemented, to approach the court for further and/or ancillary relief.*

5. *THAT the Minister be ordered to pay the costs of this application, alternatively and in the event of any other party opposing the application, then in such event, the Minister and such further party so opposing, jointly and severally, the one to pay the other to be absolved, be ordered to pay the costs of this application, such costs to include the costs incumbent upon the employ of two counsel where so employed.*

6. *THAT the court grant the applicants such further and/or alternative relief as the court deems meet".*

[2] First Applicant describes itself as an association which seeks to promote the local and regional interests of breeders and hunters within the lion industry. Second– to Eleventh Applicants are individuals who are members of the First Applicant and who conduct breeding of lion, and they are presently in possession of quantities of lion skeletons which were hunted in terms of issued permits. A spreadsheet which reflects the specific quantity of skeletons in possession of each such Applicant is annexed to the founding affidavit.

[3] The First Respondent, who is the issuing authority for those permits, admits that the Second – to Eleventh Applicants are in possession of permits which permits their breeding activities and that the lion skeletons are derived from lion which were hunted in terms of duly issued permits.

[4] When the application was instituted during 2024, Applicants joined only the First-, Second-, and Third Respondents. First Respondent is the Minister of Forestry, Fisheries and the Environment ("*the Minister*") who is the executive responsible for environmental affairs and, as will transpire later herein, is the appointed "*National Management Authority*" that is responsible for the allocation of the export quota which forms the subject of the impugned decision referred to in the amended notice of motion.

[5] Second Respondent is the Director-General, Department of Forestry, Fisheries and the Environment ("*the DG*"), who is the official responsible for the day-to-day operations of the National Department of Environmental Affairs.

[6] In terms of the original notice of motion the Minister was required, in terms of the provisions of rule 53(1)(b), to dispatch to the Registrar within 15 days the record(s) of all documents relating to and/or relied on in relation to the impugned decisions, together with reasons. The Minister failed to comply with the rule 53(1)(b) notice within that time period.

[7] On 13 May 2025 the National Council of the Society for the Prevention of Cruelty to Animals ("*NCSPCA*") served an intervention application followed by similar applications served by Ban Animal Trading NPC ("*BAT*") on 27 May 2025 and the trustees for the time being of the EMS Foundation ("*EMS*") on 25 July 2025 respectively. The NCSPCA and

EMS sought to be joined as interested parties affected by the relief sought while BAT sought to be joined as *amicus curiae*.

[8] On 31 July 2025 a case management meeting was held before the Acting Deputy Judge President *("ADJP")* of this division, which resulted in a directive being issued in terms whereof the joinder applications were separated from the main application, to be heard first, and which provided time frames for the filing of further affidavits in the three joinder applications. It further provided that the Minister was directed to file a record of decision (if any) no later than 15 August 2025. Applicants, the Minister, and the Applicants in the three joinder applications were all represented at that meeting and it was further directed that the Minister and the DG file their answering affidavit (if any) by 14 November 2025.

[9] The Minister did not file an answering affidavit as directed by 14 November 2025, but on 18 November 2025 the Minister filed a record consisting of a letter dated 25 August 2025, issued by the State Attorney, which reads:

"1. *We refer to the case management meeting dated 21 July 2025, in which the parties to the above review application agreed on time frames for the filing of the record of proceedings and subsequent pleadings.*

2. *On behalf of the First Respondent, the Minister of the Department of Forestry, Fisheries and Environmental Affairs, we confirm that the First Respondent will not file a record in respect of an export quota for the 2024 and/or 2025 calendar years for the trade in lion bones, bone pieces, bone products, claws, skeletons, skulls and skin for commercial practices and that have been derived from captive breeding operations.*

3. *A record will not be filed because no decision was taken during 2024 and/or 2025, and accordingly, no information was placed before the decision maker during the period".*

[10] On 29 August 2025, having already been in possession of the letter concerning the absence of any record, Applicants filed the amended notice of motion quoted in paragraph 1 above and a supplementary founding affidavit. On 23 March 2026 the intervention applications were set down to be heard before Van der Schyff J. who handed down a judgment on 9 April 2026 ("*the intervention judgment*"). In terms of the intervention judgment, the NCSPCA and EMS were joined as Fourth and Fifth Respondents respectively, while the application of BAT was refused.

[11] On 7 July 2026 the ADJP issued a directive in terms whereof the matter was set down for hearing in the Special Motion Court of this division on 20 and 21 October 2026. Time frames were set for the filing of heads of argument, all of which had to be finalised by 17 September 2026, and a joint practice note as required in terms of the Consolidated Practice Directive of this division had to be filed by 16h00 on 30 September 2026.

[12] On 8 October 2026, only 8 court days before the date of set down for the hearing of the application, an answering affidavit filed on behalf of the Minister and DG was uploaded onto CaseLines. The Minister and the DG did not file any heads of argument as directed at that time which resulted in the ADJP issuing a further directive which followed on a case management meeting between the ADJP and the parties on 20 October 2026. By agreement between the parties, the Minister and the DG were directed to deliver their heads of argument by 10h00 on Friday, 16 October 2026 and a joint practice note had to be filed on CaseLines by 12h00 on 16 October 2026. This court was then informed by

the ADJP that it was within this court's discretion to dispose of the matter or to postpone the matter.

[13] The heads of argument of the Minister and the DG were uploaded at 11h38 on the 16th of October 2026 and the joint practice note was uploaded onto CaseLines at 15h34 on 13 October 2026, again not complying with the issued directive.

[14] In the answering affidavit filed on behalf of the Minister and the DG, condonation was sought for the late filing of their answering affidavit. That application for condonation, in my view, does not explain why the Minister failed to comply with rule 53(1)(b) and had to be directed by this court to file a record, does not explain why every directive issued by the ADJP of this court was not complied with, and contains a reference to "*...a measure of inconvenience...*" caused to this court by the aforesaid repeated failures. That conduct is deplorable.

[15] Notwithstanding the aforesaid, the late filing of the First and Second Respondents' answering affidavit was condoned because I am of the view that it is in the interests of justice that the Minister be provided the opportunity to provide reasons and argument on the issues raised which directly affect the Minister. I further exercised my discretion to hear the matter, notwithstanding the substantial inconvenience caused by the late filing of that answering affidavit and the subsequent comprehensive heads of argument which had to be read and considered, and which also contributed to an excessive record.

BACKGROUND TO THE APPLICATION:

[16] This application relates to issues arising from the controversial practice of breeding of lion, hunting lion, and selling derivatives from that industry. In a previous application

brought by the NCSPCA against the Minister and others,[1] (which is now referred to as the "*lion bone case*") Kollapen J. (as he then was) set out in that judgment background facts which are relevant to the present dispute.[2]

[17] In summary, prior to 2016 there was no legal restriction in place which limited the quantity of lion bone to be exported from South Africa. However, at the 17th meeting of the Conference of the Parties to CITES[3] ("*Cop 17*") a proposal was submitted by certain African countries that all species of African lion be transferred to Appendix I (list of animals near extinction) of CITES, which would have had the result that all trade in African lion would have been prohibited, except in very restricted and exceptional circumstances. South Africa opposed that proposal and this resulted in a resolution that the affected loin species remained on Appendix II (animals not in danger of extinction but which requires protective measures to safeguard against extinction).[4] This resolution included an annotation which effectively regulated that annual export quotas for trade in bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes derived from captive breeding operations in South Africa will be established and communicated annually to the CITES Secretariat.[5] The relevant part of that annotation reads:

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1 *National Council of Societies for the Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others 2020 (1) SA 249 (GP).*

2 *Lion bone case, paragraphs [5] to [14].*

3 *Convention on International Trade in Endangered Species of Wild Fauna and Flora.*

4 *See in this regard paragraph 30 hereunder.*

5 *Vide: Lion Bone judgment, paragraphs [13] and [14].*

"Annual export quotas for trade of bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes derived from captive breeding operations in South Africa will be established and communicated annually to the CITES Secretariat."

[18] In terms of the provisions of CITES, read with the applicable legislation and regulatory framework which will be referred to hereunder, the South African Government legitimised an industry which breeds the majestic African lion in captivity and allows the hunting of those lions and the and export of derivatives of those lions. The Applicants are involved in the industry of breeding lions in captivity for commercial purposes and are in possession of a substantial stockpile of lion derivatives which they intend to export but which they cannot export because the Minister failed to set annual quotas for the export of lion derivatives since judgment was delivered in the lion bone case. That is so because in the lion bone case the court reviewed and set aside annual quotas which were set by the Minister at that time. The ratio for the judgment in the lion bone case, concisely stated, was that animal welfare considerations were not considered by the minister at the time when the impugned annual quotas in the lion bone case were set by the minister, and that animal welfare considerations should have been considered. In that case evidence was placed before the court to illustrate that the captive breeding and commercial exploitation of lions is a practice that offends the objects of conservation, is cruel, and should be terminated.

[19] However, in the lion bone case, the court was not requested to find that the captive breeding of lion, export of lion derivatives, or the act of the setting of an annual export quota by the minister are unlawful, and in this application none of the Respondents seek that relief. While the applicable statutory- and regulatory regime allows for such an

industry and permits are issued in terms of the applicable regulatory regime, the holder of those permits conduct their activities lawfully and have a legitimate expectation that they will be allowed to exercise their rights in terms of the issued permits and regulations. This is an important fact, because in this application, as was done in the lion bone case, the NCSPCA and EMS provided substantial evidence and material which were intended to impugn the very practice of breeding lions in captivity and exploiting them commercially. There was also extensive reference to a report of a Ministerial Task Team (*"MTT Report"*) and a policy document which conveys an intention of the Government to terminate and/or limit that practice. However, those considerations are not relevant to the issues to be determined in this application, as will be set out hereunder. While the present statutory and regulatory regime allows that practice, the law as it stands must be applied when any party affected by that law approach the court.

[20] Essentially, the Applicants approach this court and seek relief which, so they argue, will compel the Minister to comply with his legal duty to set an annual quota for derivatives from their commercial activities, which would allow them to export the stockpile, or part thereof, of captive bred lion derivatives presently in their possession. The Applicants further aver that the lion breeding practices which they conduct and the export of derivatives therefrom, form part of their economic activities and that there are a substantial number of individuals who rely on those activities for an income by virtue of their employment in that industry.

[21] In terms of the contents of the confirmation of no record letter of the State Attorney dated 25 August 2025, and from the averments as set out in the respective pleadings, it is common cause that the Minister failed to exercise any of the Minister's powers in terms

of the applicable regulatory regime referred to hereunder in order to set an annual quota for the export of captive bred lion derivatives since 2019.

THE ISSUES:

[22] In terms of paragraph 1 of the amended notice of motion as quoted above, the Applicants seek an order to declare the failure of the Minister to establish an annual export quota for the 2024 / 2025 calendar years to be unlawful and in terms of paragraph 2 of that amended notice of motion the Applicants seek an order directing the Minister to decide an annual export quota for the 2024 and 2025 calendar years while prayer 3 of the amended notice of motion is intended to compel the Minister to take into consideration the fact that there is a large stockpile of derivatives, caused by a failure to establish annual quotas since 2019.

[23] In the intervention judgment, Van der Schyff J. trenchantly described the scope of the relief sought by the Applicants *in casu* as follows:

> "[13] *If analysed, the relief sought by SAPA is tripartite in nature. First, it seeks declaratory relief coupled with a review, aimed at the Minister's historical and ongoing failure to establish quotas for the export of lion bone derivatives. Secondly, it seeks mandatory relief in the form of a mandamus, directing the Minister to perform his statutory functions and to report to SAPA on the progress thereof. Thirdly, it seeks an order compelling the Minister to take into account a specific relevant consideration, namely the existing stockpile of lion bone derivatives, when exercising the discretion.*

[14] *The relief sought by SAPA is aimed at compelling a decision, not a particular decision. In essence, the order requires (i) a decision to be taken, (ii) in a lawful manner, (iii) considering, among others, a specific factor, (iv) subject to supervisory oversight. It does not dictate the outcome, content or substance of the Minister's decision.*

[15] *In considering the intervention and admission applications, I had regard to the fact that, properly construed, the relief sought is procedural and supervisory. It does not seek to usurp the Minister's decision-making powers regarding the substantive outcome of the quota determination. The order sought does not pre-determine a numerical value, nor does it exclude a 'zero quota' determination, provided such a decision is reached lawfully and rationally. The relief sought concerns quota determination, not trade authorisation. Consequently, the relief sought does not in itself oblige the Minister to facilitate or permit the commercial trade of the derivatives in question.*

[16] *Furthermore, the relief does not seek to restrict the Minister's discretion by elevating the existence of a stockpile to a determinative factor. While the Minister would be required to take the existence of the stockpile into account, the weight to be afforded to it remains within the Minister's discretion. The Minister retains a broad discretion to balance this factor against all other vital considerations, including scientific input, public consultation, conservation imperatives, and prevailing policy frameworks. Critically, one of the relevant factors the Minister will ex lege be obliged to consider when setting an export quota, is the welfare of lions held in captivity. The relief sought does not mandate the prioritisation of*

commercial or economic interests over the Minister's broader environmental and regulatory obligations".

[24] It must be noted that Van der Schyff J. referred to the lion bone case judgment in support of that part of her judgment which refers to the welfare of lions held in captivity to be regarded as a relevant factor which the Minister will be obliged to consider when setting an export quota. That issue was also dealt with in paragraphs 18 and 19 above and the scope of the relief claimed as described by Van der Schyff J. confirms the issue of relevance as set out in paragraph 19 above.

[25] In the respective heads of argument filed on behalf of the Minister and the DG, the NCSPCA, and EMS, the primary and common ground of opposition relates to a legal issue namely whether the Minister is under a legal obligation to set an annual export quota, or whether it is purely within the discretion of the Minister to establish an annual export quota. In the joint practice note filed on 13 October 2026 the parties formulated the issues in dispute thus:

"16 ISSUES IN DISPUTE:

16.1 Whether the Minister has a legal duty to establish and communicate an annual export quota for lion bones and derivatives derived from captive breeding operations.

16.2 Whether the Minister's failure to establish annual quotas from 2019 onwards constitutes a reviewable failure to take a decision.

16.3 Whether there was a material omission to take a decision.

16.4 The relevance of welfare concerns and other factors raised by the NSPCA and EMS to the relief sought.

16.5 The NSPCA contend that an issue in dispute is whether animal welfare and the well-being of lions are mandatory relevant considerations bearing on the lawfulness of any quota determination, and whether the relief sought may be granted without regard to them. The applicants contend that this aspect is irrelevant to the current relief - it may or may not be relevant when the Minister in fact takes the decision in respect of the quota.

16.6 Condonation in respect of the late filing of the answering affidavit of the first and second respondent.

16.7 The appropriate costs order."

[26] In my view the issue as formulated in paragraph 16.1 of the joint practice note as quoted *supra*, namely whether the Minister has a legal duty to establish and communicate an annual export quota for lion bones and derivatives derived from captive breeding operations is dispositive of the matter. This is so because, if it is found that there is no such duty or obligation on the Minister (or that it is purely within the discretion of the Minister) then section 6(2)(g) of PAJA[6] is not engaged and this court cannot compel the Minister to set such a quota. In that case, all other contentions raised by the various respondents become moot because those considerations were raised as grounds of opposition to the relief sought.

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6 *Promotion of Administrative Justice Act 3 of 2000.*

IS THERE A DUTY ON THE MINISTER TO SET AN ANNUAL EXPORT QUOTA?

[27] The issue whether there is a legal duty on the Minister to establish an annual export quota for lion derivatives derived from captive breeding operations ("*the duty to establish an export quota*") must be determined by reference to the applicable legislative scheme. The Minister, the NCSPCA and EMS extensively referred to the CITES Convention, CITES Regulations and NEMBA[7] and it was argued that the provisions in terms of that statutory and regulatory scheme do not compel the Minister to determine a quota. It was argued that the statutory and regulatory scheme provides the Minister with an unfettered discretion to establish an export quota. Those respondents further relied on the policy documents referred to above to strengthen the argument that the present policy of government is namely to terminate the practice of lion breeding and associated commercial exploitation of lion which indicates an intention of the Minister not to set any future quotas for the export of lion derivatives.

[28] Section 24 of the Constitution[8] guarantees the right to an environment that is not harmful to the health and wellbeing of everyone, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that *inter alia* promote conservation and the right to the secure and sustainable development of natural resources while promoting justifiable economic and social development. A perusal of section 24 of the Constitution confirms the recognition of the fact that environmental and conservation interests have the potential to conflict with

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7 *National Environmental Management: Biodiversity Act 10 of 2004.*

8 *Constitution of the Republic of South Africa, Act No. 108 of 1996.*

economic and social development interests, as is cogently illustrated by the history of litigation between the parties to this application.

[29] NEMA[9] gives effect to section 24 of the Constitution and provides an overarching framework for environmental governance in South Africa. NEMBA[10] provides for the management and conservation of South Africa's biodiversity within the framework of NEMA, and *inter alia* provides for the use of biological resources, with fair and equitable benefits arising from bioprospecting involving indigenous biological resources, and the establishment of a South African National Biodiversity Institute.[11] In terms of section 3 of NEMBA, the State is the trustee of our biological diversity. Section 2 of NEMBA provides for the objects of that act to include, within the framework of NEMBA, for conservation, protection of species, and the use of biological resources in a sustainable manner and the consideration of the well-being of animals in the management, conservation and sustainable use thereof. NEMBA intends to provide for a fair and equitable sharing amongst stakeholders of benefits arising from bioprospecting involving indigenous biological resources.[12] Concisely put, NEMBA intends to balance competing interests between conservation and bioprospecting.

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9 *National Environmental Management Act 107 of 1998.*

10 *National Environmental Management: Biodiversity Act 10 of 2004.*

11 *NEMBA, preamble.*

12 *NEMBA, section 2(a) and (iii).*

[30] NEMBA also gives effect to ratified international agreements relating to biodiversity which are binding on the Republic.[13] CITES[14] is a multilateral treaty dealing with environmental law that seeks to regulate international trade in specimens of endangered species of wild fauna and flora. It regulates trade in endangered species and does not provide for a blanket prohibition on international trade in endangered species. CITES categorise wild fauna and flora by listing them on either Appendix I or Appendix II. Fauna and flora close to extinction are listed on Appendix I and those which are not close to extinction, but may be threatened with extinction if trade is not regulated, are listed on Appendix II. It is common cause that lion bred in captivity in South Africa are classified under Appendix II.

[31] CITES Regulations published in Government Gazette 33002 on 5 March 2010 is a schedule to NEMBA and a perusal of CITES Regulations informs that it allows derivatives of lions bred in captivity in South Africa to be exported. As alluded to in paragraph 17 above, the export of derivatives is determined by an annual quota which must be communicated to the CITES secretariat. In South Africa, CITES is governed by domestic law incorporated through sections 2, 5 and 9 of NEMBA.[15]

[32] In terms of Annotation A4 to Appendix II of the CITES Regulations as quoted in paragraph 17 above, an annual export quota for trade in derivatives of lion bred in captivity "*...will be established and communicated annually....*". It is important to note that the language

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[13] *NEMBA, section 2(b).*

[14] *Convention on International Trade in Endangered Species of Wild Fauna and Flora.*

[15] *Diedericks v MEC for Agriculture, Environmental Affairs, Rural Development and Land Reform (Northern Cape) and Another [2025] ZANCHC 104; 2026 (1) SA 574 (NCK).*

of Annotation A4 is not couched in permissive terms, but in language which implies an annual obligation.

[33] Regulation 3(2) of the CITES Regulations reads as follows:

*"3 **Management Authority***

(1) The national Minister responsible for environmental affairs is the National Management Authority for CITES related activities.

(2) The specific duties of the National Management Authority include, but are not limited to the following-

(a) to consider and grant permits and certificates in accordance with the provisions of CITES and to attach to any permit or certificate any condition that it may deem necessary;

...

(f) to consult with the Scientific Authority on the issuance and acceptance of CITES documents, the nature and level of trade in CITES-listed species, the setting and management of quotas, the registration of traders and production operations, the establishment of Rescue Centres and the preparation of proposals to amend the CITES Appendices;

...

(k) to coordinate requirements and allocate annual quotas to provinces."

[34] The Scientific Authority referred to in regulation 3(2)(f) of the CITES Regulations is the scientific authority established in terms of section 60 of NEMBA which reads:

"The Minister must establish a scientific authority for the purpose of assisting in regulating and restricting the trade in specimens of listed threatened or protected species and species to which an international agreement regulating international trade applies".

[35] In terms of section 59(a)(ii) of NEMBA the function of the Minister is stated thus:

"*Functions of Minister*

The Minister –

(a) *must monitor –*

...

(ii) *compliance in the Republic with an international agreement regulating international trade in specimens of endangered species which is binding on the Republic."*

[36] The Minister is further obliged in terms of section 59(c) to prepare and submit reports and documents in accordance with the Republic's obligations in terms of such an international agreement.

[37] When Annotation A4 quoted above, CITES Regulation 3(2), and sections 59 and 60 of NEMBA are read in conjunction, the Minister has the following functions and duties, namely:

[37.1] to monitor compliance with the CITES Convention (which requires annual export quotas to be set);

[37.2] to prepare and submit reports and documents in accordance with the Republic's obligations in terms of an international agreement (which therefore requires compliance with the duty to convey annual quotas to CITES in terms of Annotation A4);

[37.3] to consider and grant permits and certificates in accordance with the provisions of CITES and to attach the permit or certificate on condition that it may deem necessary;

[37.4] to consult with the Scientific Authority which includes consultation on the setting and management of quotas. In terms of Annotation A4 of CITES the obligation to set quotas is an annual obligation.

[38] The Minister disputes that the regulatory framework set out above bestow a legal duty on the Minister to set an annual quota. The following averments are made in the Minister's opposing affidavit, namely:

"34. *The CITES Secretariat, under CITES Regulation Conf. 14.7 (Rev. CoP15), further CITES requires that:*

'every party that has established an export quota is responsible for monitoring its use and must ensure that it is not exceeded. For that purpose, it should maintain data on the number or quantity of specimens actually exported, to be used as a reference when reviewing applications to authorise further exports'.

35. *Accordingly, quotas set legal maximums not goals, and unused amounts do not roll over to increase future quota limits.*

36. *South Africa is thus required under its obligations to CITES to employ mechanisms for monitoring and reporting trade in lion bone, and to limit the potential for illegal trade and laundering of lion and other large felid bones (This function is carried out under section 59 of the NEMBA and specifically regulation 35 of the TOPS Regulations 2007, which requires that all CBO facilities a) prevent hybridisation and inbreeding of stock; b) keep a studbook in respect of each animal; and c) submit the information to the issuing authority within 3 months of each year).*

37. *Of significance to this review, CITES does not prescribe that each State must issue an annual export quota; the decision of when to issue a quota is left to the relevant State concerned. Where a State does not issue a quota for a particular year, the Secretariat has stated that a zero quota will be entered into the records.*

38. *There is accordingly no obligation at the international level for South Africa to establish, determine and promulgated an export quote for lion bone annually".*

[39] The averments as quoted above are clearly the Minister's interpretation of the regulatory framework. In my view the regulatory framework is couched in terms which strongly mitigate against an interpretation which bestow a discretion on the Minister to set an annual export quota. The regulatory framework as referred to above, and the conduct of

the Minister's predecessors clearly confirm this duty. In the lion bone case[16] referred to above it was held:

"[22] *Section 59 of NEMBA read with Regulation 3 thereof obliges the Minister to consult with the scientific authority on issues relating to trade in specimens of endangered species, denotes the Minister as the National Management Authority for CITES and provides that the Minister shall consult with the Scientific Authority on amongst other things the nature and level of trade in CITES listed species, as well as the setting and management of quotas.*

[23] *Thus in broad terms the Minister is required to set an annual export quota but before doing so must consult with the scientific authority who in turn must both, make a non-detriment finding as required by NEMBA as well as base its findings, advice or recommendations on a broad level of public consultation as well as a scientific and professional review of available information."*

[40] On behalf of EMS it was submitted that the issue relating to the existence of a legal duty to set an annual quota was not ventilated before Kollapen J. (as he then was) in the lion bone case and therefore that the part of that judgment as quoted above does not amount to a finding on the issues before this court. I do not agree. In my view that judgment required an analysis of the relevant regulatory regime to determine if the set of a quota is a "decision" in terms of chapter 1 of PAJA and correctly concluded that the Minister is required to set an annual export quota after following the consultative cases prescribed in terms of section 59 of NEMBA and regulation 3(2) of the CITES Regulations. Clearly,

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16 *NCSPCA v Minister of Environmental Affairs and Others 2020 (1) SA 249 (GP) paras [22] to [23].*

that court interpreted the reference to "duty" in section 59 of NEMBA and CITES Regulation 3(2) as an "obligation" and that the Minister is "required" to set an annual export quota.

[41] In my view the plain language of the relevant regulatory provisions provides no scope for an interpretation that the Minister is empowered with a discretion to set an annual export quota. The CITES regulation 3(2)(f) makes no reference to a discretion, but stipulates the duties of the Minister in his capacity as the Management Authority. Section 59 of NEMBA also does not provide for a discretion but bestow a function. Viewed cumulatively, on a plain grammatical reading the regulatory framework is capable of only one interpretation namely that there is a duty on the Minister to set an annual export quota.

[42] There are further considerations which, if duly considered, confirms this duty. The Minister was appointed by the President as the executive entrusted with environmental affairs and must oversee the implementation of NEMA, NEMBA and CITES.[17] As set out above, NEMBA provides for management of the potential conflict between environmental interests on the one hand and economic- and social development interests on the other hand. That is the function of the Minister, which he fulfils by exercising public power found *inter alia* in NEMA, NEMBA, and the CITES Regulations. The Constitutional Court[18] has repeatedly held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. Where there are a number of individuals who conduct commercial captive bred lion activities in

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[17] *Section 92(1) of the Constitution of the Republic of South Africa, 1996.*

[18] *See for instance: Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000(2) SA 674 (CC) at para 18.*

terms of issued permits and who require the Minister in his capacity as the Management Authority to establish an annual quota to enable the export of derivatives from those commercial undertakings, while on the other hand an interested group such as NCSPCA and EMS have conflicting rights found on conservation considerations, the Minister may not become supine and refrain from exercising his executive powers. That offends the principle of legality, because the Minister fails to fulfil his duty to manage that conflict. That in turn, in my view, offends the rule of law because it results in an uncertain state of affairs for persons who have a legitimate expectation to be able to exercise their rights in terms of the applicable regulatory framework by relying on an established annual quota for export. That, in my view, constitutes a dereliction of his executive duties in terms of NEMA and NEMBA and thus offends section 24(b)(iii) of the Constitution.

[43] The considerations as set out above is confirmed by legal precedent. In the recent judgment of Mofokeng[19] the Constitutional Court dealt with the presidential power to grant a pardon in terms of section 84(2)(j) of the Constitution. That section reads that the President is "responsible" for pardoning or reprieving offenders and remitting any penalties, fines or forfeitures. In that regard the Constitutional Court held in paragraph 25 of the Mofokeng judgment that, although that power awarded to the President is discretionary, there are corresponding obligations to that power, and quoted the following passage from the Chonco[20] judgment of that Court;

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19 *Mofokeng and Another v President of the Republic of South Africa and Others [2026] ZACC 43*

20 *Minister of Justice and Constitutional Development v Chonco and Others (CCT 42/09) [2010] ZACC; 2010(7) BCLR 629 (CC) (8 April 2010).*

"[T]he function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently, and without delay."

In my view, the Mofokeng judgment as quoted above and authorities referred to therein confirms that, when a function or duty is conferred to the executive, there is a corresponding obligation to exercise that function or duty, especially when an affected person requires a determination of his/her rights affected by that function or duty.

[44] Thus, where the law bestow on the Minister a duty to set an annual export quota, however unpopular that function may be, it must be done because it is in the public interest that conflicting rights and expectations be resolved by applying the executive power that regulate those conflicting rights and expectations. In the decision of King,[21] which had been followed in various judgments, it was held that this obligation exists, even if the empowering provision is framed as purely discretionary, as follows:

"And it is true also that the word 'may' confers a power but in some cases the power given is of such a nature that the person to whom that power is given is under a duty to use it. Whether this is so must be ascertained from a consideration of a number of factors, which are set out in a passage from the judgment of Lord Cairns in the leading case of Julius v The Bishop of Oxford (5 A.C. 214) which was cited with approval in this Court by Innes, C.J., in Noble & Barbour v S.A. Railways (1922, A.D. 527, at p. 540); see also per Lord Blackburn at p. 241, and cf. per Wessels, J.A., in Lynch v Union Government (Minister of Justice) (1929, A.D. 281 at p. 283). It was said in the case of S.A. Railways and Harbours

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21 *Commissioner for Inland Revenue v King 1947 (2) SA 196 (A) at 209–210.*

v New Silverton Estates, Ltd. (1946, A.D., not yet reported) that permissive terms in a statute are more readily construed as creating an obligation when the statute authorises the course of action in question for the public good. If that statement could be regarded as a rule of construction applicable to a case like this it would be of assistance because the Commissioner, in performing his functions under the Act, is acting in the public interest. But attention should be directed to the judgments in the case of Julius v The Bishop of Oxford and more particularly to the remarks of Lord Blackburn at pp. 244 and 245, in which the view is expressed that empowering words are more readily construed as imposing a duty when private interests are concerned. I prefer, therefore, to draw no inference from the fact that the Commissioner, in exercising his power under sec. 90, is acting in the public interest. Having regard, however, to the factors mentioned in the Julius case, it seems that all considerations of justice and expediency require us to say that in sec. 90 the word 'may' also imports a duty to exercise the power given to the Commissioner. It could surely not have been the intention of the Legislature that the Commissioner should be given a discretion, when he has been satisfied that the transaction falls within sec. 90, in one case to say 'I will use my powers under the section' and yet in respect of another possibly identical transaction he should be able to say 'I will not use these powers'. To allow this would be to make it possible for discrimination to be exercised between different persons. I am aware that in many sections of the Act the Commissioner is given a wide discretion, but nowhere have I been able to find that he is given a discretion, when once he has satisfied himself that a tax should be charged, in effect to remit it. For that is what he would be doing if he were satisfied that liability to tax had in fact been avoided or reduced and yet refused to put the provisions of sec. 90 into operation."

[45] In *Van Rooyen*[22] the *King* decision referred to above was again approved and in footnote 163 of the *Van Rooyen* judgment it was held (relying on a number of decisions) that the interpretative approach referred to in *King* should be adopted and is permissible. In that footnote, Wade and Forsyth in "*Administrative Law*" is quoted as follows:

"The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case."

[46] The Minister and the NCSPCA relied on the Offit[23] judgment where the SCA held in paragraph 43 of that judgment that an administrative challenge under section 6(2)(g) of PAJA is incompetent in the context of a discretionary, polycentric decision. The rationale of that paragraph reads:

> *" The reason is that where s 6(2)(g) of PAJA refers to the failure to take a decision it refers to a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues. It is directed at*

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[22] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at para [182] and footnote 163.*

[23] *Offit Enterprise (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others 2010 (4) SA 242 (SCA)*

dilatoriness in taking decisions that the administrator is supposed to take and aims at protecting the citizen against bureaucratic stonewalling"

[47] In my view, the judgment of Offit does not assist the argument of the Minister and the NCSPCA because that judgment dealt with a failure to expropriate, a power which may be exercised while there is no corresponding right of any property owner to be expropriated. The judgment of Offit, on the contrary, refers to the notion of stonewalling caused by a bureaucratic failure to comply with a duty. The fact that since 2019 the Minister failed, and now clearly refuse, to set an annual export quota in terms of CITES Regulations and section 59 of NEMBA, has the practical effect that a zero quota was determined by the Minister without the consultative process which the Minister is enjoined to follow in terms of CITES Regulation 3(2)(f) read with section 59(b) of NEMBA because without an annual quota duly determined by the Minister, the Applicants' rights are sterilised, while on the other hand, the interests of interested parties such as EMS and the NCSPCA are promoted. This, in my view, constitute clear bureaucratic stonewalling of the rights of the Applicants and offends the rule of law because the failure of the Minister to exercise a statutory function failed to balance competing rights recognised by the Constitution.

[48] In my view, considering the executive function of the Minister, the objects of NEMBA, and the nature of the language of the statutory and regulatory scheme as referred to above (not being permissive, but rather stating an obligation), the regulatory scheme confers on the Minister a legal duty to set an annual export quota. The issue as formulated in paragraph 16.1 of the joint practice note as quoted above namely whether the Minister has a legal duty to establish and communicate an annual export quota for lion bones and derivatives derived from captive breeding must thus be decided in the affirmative.

MOOTNESS

[49] On behalf of the Minister it was argued that the relief sought is moot, because the prayer for a *mandamus* that the Minister must establish an export quota for the 2024 and 2025 calendar years, is incapable of implementation because export quotas under the CITES are of prospective application.

[50] In my view there is no merit in this point taken on behalf of the Minister. Where it is found that law or conduct is inconsistent with the Constitution, it must be declared to be invalid and the court then has the discretionary power to grant consequential relief.[24]

[51] Having found that the Minister has a duty to act in terms of CITES Regulation 3(2), the failure to do so is unlawful and this court is enjoined to grant a declaratory order to that effect. Furthermore, until such time that the applicable legislation is amended or repealed, that duty will remain. It is clear that where the Minister now adopts the position that he is not under a duty to establish an annual export quota (contrary to the stance adopted by his predecessors who accepted the existence of that duty) it requires that this court make an appropriate order to avoid a future ventilation of the same dispute.

IS THE RELIEF SOUGHT COMPETENT?

[52] The issue of competency of the relief sought was raised by all respondents opposing the application. Concisely stated, it was argued that the order which Applicants seek, namely that the Minister be directed to decide and establish an annual export quota for 2024 and

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[24] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others 2014 (1) SA 604 (CC)* at para 56.

2025 calendar years and to take into consideration the present large stockpile of derivatives (as framed in paragraphs 2 and 3 of the amended notice of motion), offends the separation of powers principle because this court will unduly fetter the Minister's discretion.

[53] CITES *Conf.* 14.7, paragraphs 20 to 21 (Guidelines) read as follows:

> "20. *The level of an export quota reflects the number or quantity of specimens of a species that may be exported in any particular year (the specimens having been removed from the wild, bred in captivity, artificially propagated, etc., in that year). It sometimes happens, however, that, although specimens are obtained for export, it is not possible to ship them in the year in which they were obtained.*
>
> 21. *A Party may decide exceptionally to authorize export in one year of specimens that were obtained in a previous year, and under the quota for that previous year. In such cases, the quota for the current year should not be increased in order to include the specimens obtained in the previous year. Rather the number or quantity of such specimens that will be exported should be deducted from the quota of the previous year.*"

[54] It is thus clear that specimens obtained in a particular year may be exported in a subsequent year under an export quota for the previous year. Put otherwise, a retrospective quota may be established. In my view, to order the Minister to establish export quotas for the 2024 and 2025 calendar years does not offend CITES and it is also competent by virtue of this court's discretion in terms of section 172(1)(b) of the Constitution because it is just. The duty to set a quota is a recurring duty, to be exercised

annually, and in my view it is just that the Minister be ordered to comply with that duty retrospectively.

[55] However, insofar as the Applicants seek an order that the Minister must specifically be ordered to consider the large stockpile of derivatives and their values as framed in paragraphs 3.1 and 3.2 of the amended notice of motion, I am of the view that such relief should not be granted. That is because in terms of the regulatory regime, the Minister must consult the Scientific Authority who must advise the Minister. The stockpile of derivatives is clearly a factor to be considered by the Scientific Authority together with all other relevant considerations.

[56] I am also of the view that the relief sought in paragraph 4 of the amended notice of motion should not be granted. If the Minister fails to comply with an order, that will result in a complete new and separate cause of action to any affected party. To allow any party to approach the court on the papers filed in this application, duly supplemented, will lead to an untenable situation to the court seized with that matter who will have to deal with a substantial record, most of which of which will be irrelevant. That will lead to a waste of judicial resources.

COSTS:

[57] In my view, the Minister should be ordered to pay the costs of all parties, for the following reasons:

[57.1] The litigation was caused by the failure of the Minister and his predecessors to set annual export quotas;

[57.2] The intervention by NCSPCA and EMS was not unreasonable, notwithstanding the fact that both the NCSPCA and EMS contributed to an excessive record by raising issues and relying on various reports, policy documents and evidentiary material which contributed nothing to the dispositive and crisp legal issue in dispute considering their respective agendas and values that they represent, in my view that conduct is understandable;

[57.3] The conduct of the Minister, by failing to comply with the applicable court rules and timeframes directed in various court directives, caused the intervening parties to raise issues in their respective pleadings which were eventually and belatedly raised by the Minister, shortly before the matter was set down to be heard. This conduct caused a substantial duplication of issues and argument and resulted in the waste of resources including judicial resources.

[58] Accordingly, I make the following order:

1. The failure of the First Respondent (the "Minister") to decide and to establish an annual export quota for the 2024 and/or 2025 calendar years for trade in lion bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes, derived from captive breeding operations in the Republic of South Africa ("the Republic") is declared unlawful and invalid, is reviewed and set aside.

2. The Minister is ordered and directed to take all such steps necessary to decide and establish an annual export quota for the 2024 and 2025 calendar years (and yearly thereafter, while under a statutory duty to do so) for trade in lion bones, bone pieces,

bone products, claws, skeletons, skulls and teeth for commercial purposes, derived from captive breeding operations in South Africa.

3. The Minister is ordered to pay the cost of the application, including costs of all parties opposing the application including cost of two counsel where so employed.

P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION, PRETORIA

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